IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

ESTATE OF JOHN RICK, JR., by PEG RICK, personal representative, and PEG RICK, individually, TRICIA RICK, and SARA RICK, Plaintiffs, vs. GILMORE STEVENS, Q CARRIERS, INC., a Minnesota corporation, and VALLEY RIDGE LEASING, INC., a Minnesota corporation, Defendants.	No. C 00-4144-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTION TO RECONSIDER**

TABLE OF CONTENTS

This matter comes before the court pursuant to the defendants' June 27, 2001, motion to reconsider this court's ruling of June 11, 2001. In that ruling, the court denied the separate motions to dismiss for lack of personal jurisdiction filed on December 8, 2000, by defendants Stevens and Valley Ridge Leasing and denied the defendants' joint motion, filed May 10, 2001, to dismiss or transfer based on *forum non conveniens*. However, the defendants request that, upon reconsideration pursuant to Rule 60 of the Federal Rules of Civil Procedure, the court instead dismiss this action pursuant to Rule 12(b)(3) for improper venue under 28 U.S.C. § 1391(a) or transfer this action to the proper forum in Wisconsin.

I. BACKGROUND

More specifically, in its June 11, 2001, ruling, the court found, *inter alia*, that the defendants had waived any contention that venue for this diversity action is improper in this district under 28 U.S.C. § 1391(a), not simply inconvenient, by failing to move for dismissal on that basis pursuant to Rule 12(b)(3) in their motions challenging personal jurisdiction pursuant to Rule 12(b)(2), and because they subsequently failed to amend their pre-answer motions to dismiss to seek dismissal for improper venue. The court found that the defendants originally expressly conceded that venue was proper, although their concession was mistakenly based on the Iowa venue statute, not the applicable federal statute for diversity cases. The court found further that, although the defendants recognized their mistake about the applicable venue provision in their joint reply brief in support of their motions to dismiss, the defendants also acknowledged that they had waived the issue of improper venue. It is these findings and conclusions concerning waiver of the issue of improper venue that the defendants now ask the court to reconsider.

The defendants acknowledge that Rule 12(h) of the Federal Rules of Civil Procedure specifically provides that "a defense of . . . improper venue . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." FED. R. CIV. P. 12(h). However, the defendants argue that they "complied with the letter of Rule 12(h) when they raised the defense of improper venue in their Reply brief." Defendants' Motion To Reconsider at ¶ 4. Specifically, they contend that they did not omit the issue of improper venue, but erroneously relied on the Iowa venue provision, as they conceded in their reply brief, and, once they discovered their error, "the issue of improper venue was seasonably raised and specifically presented in defendants' Reply to Resistance to Motion to Dismiss, thereby conforming to the requirements of the Rules." *Id.* at ¶ 5. They contend that the issue of improper venue was raised as soon as their error was discovered, it was specifically discussed during oral arguments on their motions, and the plaintiffs have suffered no prejudice where they had the opportunity to argue the improper venue issue. Thus, the defendants contend that the underlying purposes of Rule 12(h), including avoidance of venue challenges well into preparation of the case or shortly before trial, have not been compromised in this case. Moreover, they contend that they properly "joined" the improper venue issue with their Rule 12(b) challenges to personal jurisdiction, as required by Rule 12(g), by raising the venue issue in their reply, so that the issue was not waived. Finally, they contend that this court has the authority to raise the issue of improper venue and transfer the case on its own motion. The plaintiffs resisted the defendants' motion to reconsider on June 28, 2001, asserting that, for the reasons originally set forth in the court's June 11, 2001, ruling, the court correctly decided the venue issue. The plaintiffs contend that there is no reason to reconsider that decision now.

II. LEGAL ANALYSIS

A. Standards For "Reconsideration" Under Rule 60

Although the defendants cite Rule 60 of the Federal Rules of Civil Procedure as the authority for their "motion to reconsider," they do not identify what provision of the rule or what standards might be applicable to their motion.[1] The court finds no assertion in the defendants' motion to reconsider that there are "clerical mistakes" in the court's June 11, 2001, ruling, so that Rule 60(a) appears to be an unlikely candidate for the relief they seek. *See* FED. R. CIV. P. 60(a) (providing for correction of "clerical mistakes in judgments, orders or other parts of the record"). Rule 60(b), however, is a more likely basis for the relief the defendants seek, although the court is still left to discern the precise basis for the defendants'"motion to reconsider" under that portion of the rule. Rule 60(b) provides, in pertinent part, as follows:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated as intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

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[1] "By its terms, only Rule 60(b) encompasses a motion filed in response to an order. Rule 59(e) motions are motions to alter or amend a judgment, not any nonfinal order." *Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999).

FED. R. CIV. P. 60(b). Rule 60(b) "authorizes relief based on certain enumerated circumstances (for example, fraud, changed conditions, and the like)," *Broadway v. Norris*, 193 F.3d 987, 990 (8th Cir. 1999); *MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 755 (8th Cir. 1996) ("Federal Rule of Civil Procedure 60(b) provides that the court may relieve a party from a final judgment for, among other reasons, mistake, inadvertence, surprise, or excusable neglect."), including the "catchall" ground of "any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b)(6). This "catchall" ground appears to be the only one the defendants could reasonably invoke in the present case and, in the absence of precise specification from the defendants, the court will proceed first on the assumption that this is the portion of Rule 60 that the defendants intended to invoke.

Turning from available grounds for relief to the standards applicable to such relief, Rule 60(b) "is not a vehicle for simple reargument on the merits." *Broadway*, 193 F.3d at 990. Thus, a "motion to reconsider" pursuant to Rule 60(b) is properly denied, for example, where the movant "d[oes] nothing more than reargue, somewhat more fully, the merits of their claim." *Id.*; *Sanders v. Clemco Indus.*, 862 161, 170 (8th Cir. 1988) (a Rule 60(b) motion may be denied where it raises only issues of law previously rejected by the court, because the failure to present reasons not previously considered by the court "'alone is a controlling factor against granting relief'") (quoting *Fox v. Brewer*, 620 F.2d 177, 180 (8th Cir. 1980)). Indeed, "[t]his rule 'provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances.'" *Sanders*, 862 F.2d at 169 n.14 (quoting *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986) (*per curiam*), *cert. denied*, 484 U.S. 836 (1987)); *see also United States v. One Parcel of Property Located at Tracts 10 & 11 of Lakeview Heights*, 51 F.3d 117, 120 (8th Cir. 1995) ("A district court should grant a Rule 60(b) motion 'only upon an adequate showing of exceptional circumstances.'") (also quoting *Young*); *Mitchell v. Shalala*, 48 F.3d 1039 (8th Cir. 1995) ("Generally, Rule 60(b) provides for extraordinary relief, which may be granted only upon

a showing of exceptional circumstances."); *Atkinson v. Prudential Property Co., Inc.*, 43 F.3d 367 (8th Cir. 1994) (also quoting *Young*); *Schultz v. Commerce First Fin.*, 24 F.3d 1023, 1024 (8th Cir. 1994) (also quoting *Young*); *Robinson v. Armontrout*, 8 F.3d 6 (8th Cir. 1993) (also quoting *Young*); *Reyher v. Champion Int'l Corp.*, 975 F.2d 483, 488 (8th Cir. 1992) (Rule 60(b) provides for extraordinary relief which may be granted only on adequate showing of exceptional circumstances). This standard of requiring "exceptional circumstances" in order to provide relief applies even to motions brought on the "catch-all" ground found in Rule 60(b)(6), the only ground that appears to be applicable here, at least at first blush. *Atkinson*, 43 F.3d at 373; *Schultz*, 24 F.3d at 1024; *In re Zimmerman*, 869 F.2d 1126, 1128 (8th Cir. 1989).

On the other hand, a Rule 60(b) motion is "committed to the sound discretion of the trial court." *MIF Realty L.P.*, 92 F.3d at 755. As the Eighth Circuit Court of Appeals has also explained,

> Rule 60(b) is to be given a liberal construction so as to do substantial justice and "'to prevent the judgment from becoming a vehicle of injustice.'" *Id.* (quoting *United States v. Walus*, 616 F.2d 283, 288 (7th Cir. 1980)). This motion is grounded in equity and exists "to preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts." *Id.* (internal quotations omitted) (alterations in original). *See also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 2857, at 255 (2d ed. 1995) ("Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b).").

MIF Realty L.P., 92 F.3d at 755-56. While Rule 60(b) motions are "disfavored," the Eighth Circuit Court of Appeals has also "recognize[d] that they 'serve a useful, proper and necessary purpose in maintaining the integrity of the trial process, and a trial court will be reversed where an abuse of discretion occurs.'" *Id.* at 755 (quoting *Rosebud Sioux Tribe*

v. A & P Steel, Inc., 733 F.2d 509, 515 (8th Cir.), *cert. denied*, 469 U.S. 1072 (1984)). An "abuse of discretion" occurs "if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Id.* (internal quotation marks omitted) (quoting *Hosna v. Groose*, 80 F.3d 298, 303 (8th Cir. 1996), *cert. denied*, 519 U.S. 860 (1996), in turn quoting *International Ass'n of Machinists & Aerospace Workers v. Soo Line R.R.*, 850 F.2d 368, 374 (8th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1010 (1989)).

As explained more fully below, the court finds that the defendants' motion to reconsider, not this court's ruling finding waiver of the improper venue issue, is based on faulty factual and legal contentions, and as such, it presents no "exceptional circumstances" justifying "extraordinary relief." *See, e.g.*, *Sanders*, 862 F.2d at 169 n.14.

B. Waiver Of The Improper Venue Issue

1. Waiver as a matter of fact

As to matters of fact, the court finds, first, that the defendants did not simply "seasonably rais[e] and specifically presen[t]" the issue of improper venue in their reply brief, as they now contend. Rather, the court finds that, in their reply brief in support of their motion to dismiss, the defendants acknowledged that they were arguing that venue was improper under 28 U.S.C. § 1391(a) for the first time in the face of prior concessions that venue was proper and in the face of their recognition of the possibility that they had waived the issue by failing to assert it in a Rule 12(b) motion to dismiss. Specifically, the defendants stated in their reply brief, in a footnote to their new argument for dismissal based on improper venue,

> Counsel makes the following venue argument on this Reply, despite its failure to properly address or argue the issue in the initial briefs. Counsel for defendants virtually conceded the point on page 2 of its Briefs, which erroneously used the State

> of Iowa's venue provisions in reference to federal diversity venue requirements. *Finally, counsel is mindful that FRCP 12(g), (h) contemplate waiver of such argument if not included in the Motion.*

Defendants' Reply To Resistance To Motion To Dismiss at 5 n.2 (emphasis added). In their reply brief, the defendants offered no argument whatsoever that the issue of improper venue had been "seasonably raised," properly incorporated into their Rule 12(b) motion pursuant to Rule 12(g), or that it had *not* been waived. Thus, as a matter of fact, the defendants initial assertion of the improper venue issue was tied to their recognition that they had or likely had waived the issue by not including it in their Rule 12(b) motion to dismiss.

Second, on April 27, 2001, the court held a conference with the parties at which the court inquired whether the plaintiffs would consent to the transfer of this case to Wisconsin, because this district was not a proper venue, notwithstanding the defendants' failure to assert improper venue in their Rule 12(b) motion. When the plaintiffs declined, the court entered an order on April 27, 2001, setting a deadline for the defendants to file a motion to transfer pursuant to 28 U.S.C. § 1404 based on *inconvenience* of the forum and scheduling oral arguments on the defendants' motions to dismiss and for change of venue.[2] The plaintiffs responded to the anticipated motion pursuant to 28 U.S.C. § 1404 on May 11, 2001, apparently unaware until oral arguments on May 25, 2001, that the defendants had actually filed a motion in response to the court's April 27, 2001, order. Thus, because the court asked whether the plaintiffs would consent to transfer to another venue, notwithstanding the defendants' failure to assert properly that venue in this district was improper, and because the court granted the defendants time to assert a motion challenging

[2]Although the defendants were granted leave to file a motion for change of venue pursuant to 28 U.S.C. § 1404, they instead filed on May 10, 2001, a "Motion To Dismiss Based On Doctrine Of *Forum Non Conveniens*."

the *convenience* of the forum, it should have been clear that neither the parties nor the court contemplated that the defendants had properly presented a motion to dismiss pursuant to Rule 12(b)(3) for improper venue under 28 U.S.C. § 1391(a). Indeed, the defendants never argued during the April 27, 2001, conference that the issue of improper venue had been properly presented or had not been waived, nor did they ever attempt to amend their motion to dismiss to assert improper venue or incorporate into their motion challenging the *convenience* of the forum an alternative challenge to the propriety of the forum.

Finally, as to matters of fact, the court recognizes that, during the oral arguments on the defendants' motion to dismiss or for a change of venue on May 25, 2001, defendants' counsel made two references to the impropriety of this venue under 28 U.S.C. § 1391(a). However, in the first such reference, counsel acknowledged that the defendants had "belatedly" alerted the court to the defendants' "argument" that venue was improper. *See* Real Time Transcript, Oral Arguments on Defendants' Motion To Dismiss For Lack Of Personal Jurisdiction And Forum Non Conveniens, May 25, 2001, at 1. In the second reference, counsel argued briefly that venue here "flunked" all three parts of 28 U.S.C. § 1391(a), but that Wisconsin satisfied the third part, that is, 28 U.S.C. § 1391(a)(3). *Id.* at 4-5. However, these arguments cannot salvage the issue of improper venue for the court's consideration if the issue has not been properly asserted or has been waived.

2. Waiver as a matter of law

As a matter of law, the defendants never properly asserted that venue was improper, and in fact waived such a contention. In arguing otherwise, the defendants' reliance on purported compliance with Rule 12 is misplaced. Rule 12(b) identifies "improper venue" as one of the defenses that "shall be asserted in the responsive pleading" to a complaint, or "may at the option of the pleader be made *by motion*." *See* FED. R. CIV. P. 12(b)(3) (emphasis added). As defendants recognize in their motion to reconsider, under Rule 12(g), a *motion* to dismiss for improper venue may be "joined" with a *motion* to dismiss for lack

of personal jurisdiction, that is, a motion to dismiss pursuant to Rule 12(b)(2), or a motion asserting any other Rule 12(b) ground for dismissal. *See* FED. R. CIV. P. 12(g) ("A party who makes *a motion* under this rule *may join with it any other motions* herein provided for and then available to the party.") (emphasis added). Moreover, Rule 12(g) provides that "[i]f a party makes a *motion* under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, *the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated." Id.* (emphasis added). Thus, Rule 12(g) confirms that failure to join a *motion* to dismiss on a Rule 12(b) ground, such as to dismiss for improper venue, with any other Rule 12(b) motion asserted by the movant waives the Rule 12(b) defense not so joined. Subdivision (h)(1) of Rule 12 confirms the effect of failure to assert *a motion* for improper venue pursuant to Rule 12(b) or (g):

> (1) A defense of . . . improper venue . . . is *waived* (A) *if omitted* from a *motion* in the circumstances described in subdivision (g), or (B) if it is *neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course*.

FED. R. CIV. P. 12(h)(1) (emphasis added). *See, e.g., American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106-07 (9th Cir. 2000) ("A fundamental tenet of the Federal Rules of Civil Procedure is that certain defenses under Fed. R. Civ. P. 12 must be raised at the first available opportunity or, if they are not, they are forever waived. *See* Fed. R. Civ. P. 12(g), (h). Rule 12(h) provides that a 'defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading. . . .' *Id*. Rule 12(g) states that '[i]f a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits

to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted. . . .' *Id.*"), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1735 (2001).

Although the defendants contend that they "complied with the letter of Rule 12(h) when they raised the defense of improper venue in their Reply brief," Defendants' Motion To Reconsider at ¶ 4, raising the issue in a reply brief does not constitute "joining" a Rule 12(b)(3) motion to dismiss for improper venue with a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(g), nor does it constitute inclusion of the issue in a "responsive pleading" pursuant to Rule 12(h)(1)(B). First, inclusion of the improper venue defense in a reply brief does not constitute "joining" the improper venue *motion* with the defendants' Rule 12(b)(2) *motions* to dismiss for lack of personal jurisdiction within the meaning of Rule 12(g). Subdivisions (g) and (h)(1)(A) of Rule 12 discuss the effect of "omitting"—*i.e.*, not "joining" or "including"—a Rule 12(b) ground for dismissal from the Rule 12(b) pre-answer motion. The Advisory Committee Notes to the 1946 Amendment to Rule 12 point out that the alteration of the "except" clause in subdivision (g) "requires that other than provided in subdivision (h) a party who resorts to *a motion* to raise defenses specified in the rule, *must include in one motion all that are then available to him*," whereas "[u]nder the original rule defenses which could be raised by motion were divided into two groups which could be the subjects of two successive motions." FED. R. CIV. P. 12, Advisory Committee Notes, 1946 Amendments, subdivision (g) (emphasis added). This explanation makes clear that "join" in Rule 12(g) means "included" in the pre-answer motion itself. The Advisory Committee Notes to the 1966 Amendment confirm this reading of "joining" Rule 12(b) grounds in the pre-answer motion itself, not simply raising additional issues in supporting briefs:

> Subdivision (g) has forbidden a defendant who makes *a preanswer motion* under this rule from making *a further motion* presenting any defense or objection which was *available to him at the time he made the first motion and which he could have*

> *included*, but did not in fact include therein. *Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion.* Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

FED. R. CIV. P. 12, Advisory Committee Notes, 1966 Amendment, subdivision (g) (emphasis added). The defendants' challenge to improper venue was plainly "omitted" from the defendants' motions to dismiss for lack of personal jurisdiction and neither defendant filed an amended or substituted motion to dismiss that "joined" or "included" a motion challenging venue pursuant to Rule 12(b)(3) with their motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2). An assertion that the venue was improper was also plainly "available" to the defendants at the time they challenged personal jurisdiction, *see* FED. R. CIV. P. 12(g), because the circumstances relevant to venue were already established, even if the defendants were mistaken about the applicable venue statute. The distinction between "joining" or "including" a ground for relief in a "motion" and mentioning an additional ground for relief in the briefing of that motion is reinforced by Local Rule 7.1. Under Local Rule 7.1(g), reply briefs are permitted "to assert newly-decided authority or to respond to new and unanticipated arguments made in the resistance." N.D. IA. L.R. 7.1(g). Thus, inclusion of a new ground for relief in a reply brief is improper as a matter of motion practice in this court and, indeed, in this circuit. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881 (8th Cir. 2001) ("It is well established that issues not argued in an opening brief cannot be raised for the first time in a reply brief," citing *United States v. Vincent*, 167 F.3d 428, 432 (8th Cir.), *cert. denied*,

528 U.S. 848 (1999); *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998); *United States v. Davis*, 52 F.3d 781, 783 (8th Cir. 1995); *French v. Beard*, 993 F.2d 160, 161 (8th Cir. 1993), *cert. denied*, 510 U.S. 1051 (1994)). Therefore, inclusion of a new ground for dismissal in a reply brief cannot substitute for proper "inclusion" or "joining" of a ground for relief in a "motion."

Furthermore, inclusion of the improper venue issue in a "reply" does not constitute assertion of the issue in a "responsive pleading" within the meaning of Rule 12(h)(1)(B), as the defendants contend. Rule 7(a) identifies pleadings as a "complaint," "answer," "reply to a counterclaim," "answer to a cross-claim," "third-party complaint," and "third-party answer." FED. R. CIV. P. 7(a). That rule states further that "[n]o other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer." *Id.* A reply brief in support of a motion to dismiss for lack of personal jurisdiction is conspicuously absent from this list of allowable "pleadings." Indeed, "motions and other papers" are treated separately from "pleadings" in Rule 7. *See* FED. R. CIV. P. 7(b). Thus, while a reply brief may be "responsive," it is not a "responsive pleading" under the Federal Rules of Civil Procedure, and more particularly, it is not a "responsive pleading" within the meaning of Rule 12(h)(1)(B).

Thus, the defendants both (1) omitted from their Rule 12(b) *motion* challenging personal jurisdiction their challenge to the propriety of venue, which was then available to them, and thus have not satisfied Rule 12(g), and (2) neither challenged venue by Rule 12(b) motion nor included their challenge to venue "in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." *See* FED. R. CIV. P. 12(h)(1). Therefore, they waived this ground for dismissal. *Id.*

Nor can the defendants contend that they "seasonably raised" the issue of improper venue "by conduct," when the issue was mentioned in their reply brief, notwithstanding their failure to make "formal submission" of the matter by pre-answer motion. *See, e.g.*,

Yeldell v. Tutt, 913 F.2d 533, 539 (8th Cir. 1990) (recognizing that a Rule 12(b) defense "'may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct'") (quoting *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939)). The court concludes that raising the issue in the last permissible brief, after asserting only a different Rule 12(b) ground and expressly conceding that venue was proper, which left the plaintiffs with no opportunity to respond in briefing as a matter of right, is not the sort of tactic that should be tolerated. *Cf. id.* (asserting lack of personal jurisdiction in an answer, but omitting to raise it again until after discovery, motions, trial, and post-trial motions was not a tactic the court would permit). Furthermore, when the defendants first "raised" the issue of improper venue in their reply brief, the defendants themselves suggested that the issue might have been waived, and failed to argue any basis for a contrary conclusion, thus weakening their submission of the issue "through conduct."

Nor does the court find that the purposes of Rule 12(h) have been served, notwithstanding the defendants' failure to make formal submission of the improper venue issue, despite the defendants' contention that they provided notice of the issue and the parties had the opportunity to argue the issue. First, as mentioned above, the defendants' failure to raise the issue of improper venue until their reply brief foreclosed the plaintiffs' opportunity to brief the issue as of right. Moreover, the telephonic status conference on April 27, 2001, at which the court inquired whether the plaintiffs would consent to transfer of the case, notwithstanding the defendants' waiver of the improper venue issue, should have made clear that the court considered the argument waived in the absence of an amended motion to dismiss, obviating any need for the plaintiffs to argue either that the improper venue issue had been waived or that venue in this district is not improper. Similarly, to the extent the defendants now contend that the court had the authority to recognize the improper venue issue and transfer the case *sua sponte*, the status conference on April 27, 2001, should have made clear that the court *had* recognized the issue, and had declined to transfer the

case in the absence of a formal motion by the defendants or consent by the plaintiffs.

C. Other Rule 60(b) Grounds

Finally, to the extent the defendants rely on "mistake" or "excusable neglect" by counsel as grounds for relief under Rule 60(b), rather than the "catchall" ground for relief in Rule 60(b)(6), their motion to reconsider will also be denied. *See* Rule 60(b)(1). Because the effect of waiver of Rule 12(b) grounds for dismissal by failure to assert them in an appropriate fashion is so very clear under Rule 12(g) and (h), the court does not believe that failure to consider all six Rule 12(b) grounds before filing a pre-answer motion should be considered "excusable neglect" or the sort of "exceptional circumstances" that should permit Rule 60(b) relief. *See Sanders*, 862 F.2d at 169 n.14; *see also Lakeview Heights*, 51 F.3d at 120. Here, the defendants' counsel contend that they were not negligent, because they considered the venue issue, but by mistake simply considered the wrong venue statute, examining the Iowa venue statute rather than the federal venue statute. "Mistake" that certainly was, but the Eighth Circuit Court of Appeals has previously held that "counsel cannot obtain relief [under Rule 60(b)] by pointing to his carelessness or negligence." *Hoffman v. Celebrezze*, 405 F.2d 833, 835 (8th Cir. 1969). The mistake here does not appear to the court to be the sort of mistake contemplated by Rule 60(b), as it does not involve any mistake about the facts or circumstances, nor is it merely a clerical mistake. *See id*. Thus, relief will not be granted under Rule 60(b)(1), either.

III. CONCLUSION

The defendants have failed to establish any "exceptional circumstances" justifying the "extraordinary relief" of reconsideration and modification of the court's June 11, 2001, ruling, which denied dismissal for improper venue on the basis that such a ground for dismissal had been waived. The defendants' June 27, 2001, motion, which requests that the

court reconsider its June 11, 2001, ruling and dismiss this action for improper venue pursuant to 28 U.S.C. § 1391(a) and Rule 12(b)(3) or transfer this action to the proper forum, is **denied**.

IT IS SO ORDERED.

DATED this 18th day of July, 2001.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA